Muhammad Said Amin v Haszeri bin Hussin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-579 OF 2011
YEOH WEE SIAM J
24 OCTOBER 2013

Civil Procedure — Proceedings — Committal — Application for — High Court granted consent order to redeem property in dispute and to complete transfer of title within 12 months — Non-compliance and failure to comply with consent order — Consent order served on defendant with penal notice — Whether contrary to O 45 r 7(4)(a) of the Rules of Court 2012 — Whether application ought to be allowed

This was the plaintiff's notice of application ('the application') under O 52 of the Rules of Court 2012 ('ROC') for an order of committal against the defendant for non-compliance with and failure to comply with the consent order which was previously granted by the High Court. The plaintiff, an Indonesian national, had previously appointed the defendant, as his trustee, to buy a property from the developer in the sum of RM2,376,000. The defendant was required to transfer the title of the property to the plaintiff. On 5 December 2008, the defendant entered into a sale and purchase agreement ('SPA') with the developer and purchased the property in his name. The defendant later charged the property to AmBank for loan facilities and failed to take any steps to transfer the title of the property to the plaintiff. The property was auctioned off by AmBank and the plaintiff obtained ex parte injunction against AmBank to stop the auction until the outcome of the committal proceedings in the present case. Under the consent order, the defendant was required to redeem property in dispute; and was required to complete the transfer of the title within 12 months from the date of the High Court's judgment. The defendant argued that this application ought to be dismissed as the consent order served on the defendant with a penal notice and this was contrary to O 45 r 7(4)(a) of the ROC which made it mandatory for the penal notice to be given.

Held, allowing the application:

(1) The defendant had not complied with the consent order and was therefore liable to committal proceedings. The court ordered the defendant to pay a fine of RM100,000 in default seven months' imprisonment (see para 7).

(2) The requirement of the endorsement of a penal notice in the court order under O 45 r 7(4)(a) of the ROC would only apply in a situation where

the person served personally with the order was required to 'obey the order within the time specified therein' and that 'if he disobeys the order, he is liable to process of execution to compel him to obey'. However, in the present case, O 45 r 7(4)(a) of the ROC did not apply because the 12 months allowed in the consent order for the defendant to comply with the order to transfer the property to the plaintiff was already over. The issue of execution of the consent order under O 45 of the ROC did not arise at all (see paras 8–9).

(3) As can be seen from O 52 of the ROC, the plaintiff's application was for committal of the defendant for contempt of court for not complying with the consent order. In O 52 of the ROC there is no mandatory requirement of a penal notice to be endorsed in the order sought to be enforced by the applicant. All that was required was for the plaintiff to apply by way of an ex parte notice of application under O 52 r 3 of the ROC for leave of the court to commence committal proceedings and such application must be supported by the statement as required in r 3(2). The plaintiff had duly complied with the requirements of O 52 r 3(1)(2) of the ROC and the court had granted the plaintiff leave to commence committal proceedings against the defendant. The application and cause papers have been served on the defendant. Thus, procedurally, O 52 of the ROC had been complied with by the plaintiff (see paras 13–15).

(4) Even if the plaintiff was found lacking in compliance with any procedural technicality under O 52 r 5 of the ROC, the court had the power to make an order of committal on its own motion against a person guilty of contempt of court. In this case, it was clear that there was a total disregard and failure of, and breach by the defendant of the consent order for about a year after the 12 months allowed in the order (see para 26).

[Bahasa Malaysia summary

Ini adalah notis permohonan plaintif ('permohonan') di bawah A 52 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk suatu perintah pengkomitan terhadap defendan kerana tidak mematuhi dan gagal untuk mematuhi perintah persetujuan yang yang telah diberikan oleh Mahkamah Tinggi. Plaintif, seorang warga Indonesia, sebelum ini telah melantik defendan, sebagai pemegang amanah, untuk membeli hartanah daripada pemaju dengan jumlah wang sebanyak RM2,376,000. Defendan dikehendaki memindahkan hak milik hartanah kepada plaintif. Pada 5 Disember 2008, defendan telah menandatangani satu perjanjian jual beli ('PJB') dengan pemaju dan membeli hartanah atas namanya. Defendan kemudian menggadaikan hartanah itu kepada AmBank bagi kemudahan pinjaman dan gagal untuk mengambil apa-apa langkah untuk memindahkan hak milik hartanah kepada plaintif. Harta itu telah dilelong oleh AmBank dan plaintif mendapatkan injunksi secara ex parte terhadap AmBank untuk menghentikan

lelongan sehingga keputusan prosiding pengkomitan di dalam kes ini. Di bawah perintah persetujuan, defendan dikehendaki menebus harta yang dipertikaikan dan dikehendaki menyiapkan pemindahan hak milik dalam tempoh 12 bulan dari tarikh penghakiman Mahkamah Tinggi. Defendan berhujah bahawa permohonan ini patut ditolak memandangkan perintah persetujuan yang disampaikan kepada defendan bersama notis penal dan ini adalah bertentangan dengan A 45 k 7(4)(a) KKM yang menjadikannya notis penal wajib diberikan.

Diputuskan, membenarkan permohonan:

(1) Defendan telah tidak mematuhi perintah kebenaran dan oleh itu dikenakan prosiding pengkomitan. Mahkamah mengarahkan defendan untuk membayar denda sebanyak RM100,000 atau penjara tujuh bulan (lihat perenggan 7).

(2) Persyaratan pengesahan notis penal dalam perintah mahkamah di bawah A 45 k 7(4)(a) KKM hanya terpakai dalam situasi di mana orang yang disampaikan secara sendiri dengan perintah itu dikehendaki 'obey the order within the time specified therein' dan sekiranya 'if he disobeys the order, he is liable to process of execution to compel him to obey'. Walau bagaimanapun, dalam kes ini, A 45 k 7(4)(a) KKM tidak terpakai kerana 12 bulan yang dibenarkan dalam perintah persetujuan bagi defendan untuk mematuhi perintah untuk memindahkan hartanah kepada plaintif sudah tamat. Isu pelaksanaan perintah persetujuan di bawah A 45 KKM tidak timbul sama sekali (lihat perenggan 8–9).

(3) Seperti yang dapat dilihat daripada A 52 KKM, permohonan plaintif adalah untuk pengkomitan defendan kerana menghina mahkamah kerana tidak mematuhi perintah persetujuan. Di bawah A 52 KKM tidak ada persyaratan mandatori notis penal diendorskan dalam perintah yang hendak dikuat kuasakan oleh pemohon. Apa yang diperlukan adalah untuk plaintif memohon melalui notis permohonan ex parte di bawah A 52 k 3 KKM untuk kebenaran mahkamah untuk memulakan prosiding komital dan permohonan itu hendaklah disokong dengan kenyataan seperti yang dikehendaki oleh k 3(2). Plaintif telah mematuhi dengan sewajarnya persyaratan A 52 k 3(1)(2) KKM dan mahkamah telah memberikan kebenaran kepada plaintif untuk memulakan prosiding komital terhadap defendan. Permohonan dan kertas tindakan telah disampaikan kepada defendan. Oleh itu, secara prosedurnya, A 52 KKM telah dipatuhi oleh plaintif (lihat perenggan 13–15).

(4) Walaupun sekiranya plaintif didapati kurang dalam mematuhi apa-apa prosedur teknikal di bawah A 52 k 5 KKM, mahkamah mempunyai kuasa untuk membuat perintah pengkomitan atas kehendaknya sendiri ke atas seseorang yang melakukan kesalahan menghina mahkamah. Dalam kes ini, ia adalah jelas bahawa terdapat pengabaian penuh dan

kegagalan, serta pelanggaran oleh defendan atas perintah persetujuan selama sekitar setahun setelah 12 bulan dibenarkan dalam perintah itu (lihat perenggan 26).]

Cases referred to

M Cheng Construction Sdn Bhd v Hasman Jalil & Anor [2002] MLJU 733; [2003] 6 CLJ 251, HC (refd)
Tan Bee Ang v Siew Chee Choong [2011] 1 LNS 121, HC (distd)
Tiger Powerhitz Sdn Bhd v Guinness Anchor Marketing Sdn Bhd [2003] 1 MLJ 314; [2003] 5 CLJ 78, HC (refd)

Legislation referred to

Criminal Procedure Code s 432(2)
Rules of Court 2012 O 45, O 45 r 5, O 45 rr 7(1), (2), (3), (4)(a), O 52, O 52 rr 2B, 3, 3(1), (2), 4, 5, O 92 r 4
Rules of the High Court 1980 O 45, O 52

Muhammad Shukri Mazlan (Badrul Zaidi & Huzaimi) for the plaintiff.
Adnan Seman (Adnan Sharida & Associates) for the defendant.

Yeoh Wee Siam J:

ENCLOSURE 31

[1] This is the plaintiff's notice of application ('application') under O 52 of the Rules of Court 2012 ('ROC') for an order of committal against the defendant for non-compliance with and failure to comply with the consent judgment dated 22 October 2011 ('or the consent order') which was previously granted by the Kuala Lumpur High Court.

BRIEF FACTS

[2] On 22 October 2011 a consent judgment was recorded by the court for the dispute between the plaintiff and defendant in this action as follows:

(a) the defendant is required to redeem the property known as No 43, Jalan Manja 5, Villa Manja, Sunway SPK Damansara, Bandar Manjalara, Kuala Lumpur ('the property') from AmBank (M) Bhd ('AmBank'); and

(b) the defendant is required to complete the transfer of title within the period of 12 months from the date of the court judgment.

[3] By way of a background, the plaintiff, an Indonesian national, had previously appointed the defendant, as his trustee, to buy the property from the

Developer, Sunway Homes Sdn Bhd, with cash of RM2,376,000 (exh MSA1 of plaintiff's statement in encl 28 for application for leave in encl 27). The defendant was required to transfer the title of the property to the plaintiff. On 5 December 2008 the defendant entered into a sale and purchase agreement with the developer and purchased the property in his name for RM2,376,000. The defendant later charged the property to AmBank for loan facilities and failed to take any steps to transfer the title of the property to the plaintiff.

[4] The plaintiff was shocked when he discovered that the property was to auctioned off by AmBank on 22 August 2013. Vide Civil Suit No 22NCVC-492–08 of 2013 in the Kuala Lumpur High Court, the plaintiff obtained an ex parte injunction on 21 August 2013 (encl 2) and subsequently, after inter partes hearing on 4 September 2013 (encl 00), a consent order for an injunction against AmBank, the first defendant therein, to stop the auction of the property by AmBank until the outcome of the committal proceedings in the present case. The plaintiff stated that the defendant had failed to comply with the terms of the consent judgment and until the day of the committal proceedings, the defendant still had not transferred the property to the plaintiff.

THE COURT'S DECISION GIVEN ON 17 OCTOBER 2013 REGARDING ENCL 31

[5] The application of the plaintiff is allowed. The court has found that the defendant has not complied with the consent judgment dated 22 October 2011 and therefore liable to committal proceedings. The court orders that the defendant pays a fine of RM100,000 in default seven months' imprisonment. Costs of RM5,000 are to be paid by the defendant to the plaintiff forthwith.

GROUNDS FOR THE COURT'S DECISION

[6] Counsel for the defendant submitted that this application ought to be dismissed on the main ground that the consent order dated 22 October 2011 that was served on the defendant was not endorsed with a penal notice. This is contrary to O 45 r 7(4)(a) of the ROC which makes it mandatory for the penal notice to be given. He relied on *Tiger Powerhitz Sdn Bhd v Guinness Anchor Marketing Sdn Bhd* [2003] 1 MLJ 314; [2003] 5 CLJ 78, *M Cheng Construction Sdn Bhd v Hasman Jalil & Anor* [2002] MLJU 733; [2003] 6 CLJ 251 and a previous decision given by me in *Tan Bee Ang v Siew Chee Choong* [2011] 1 LNS 121.

[7] Order 45 rr 7(1), (2), (3) and (4)(a) of the ROC provide:

Service of copy of judgment or order prerequisite to enforcement under rule 5 (O 45, r 7)

7(1) In this rule, references to an order shall be construed as including references to a judgment.

(2) Subject to Order 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless

(a) a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1) (B) or (C) unless

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) …

(4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) …

[8] In my view the requirement of the endorsement of a penal notice in the court order under O 45 r 7(4)(a) of the ROC applies only in a situation where the person served personally with the Order is required to 'obey the order within the time specified therein' and that 'if he disobeys the order, he is liable to process of execution to compel him to obey.

[9] However, in the present case, O 45 r 7(4)(a) of the ROC does not apply because the 12 months allowed in the consent order from 22 October 2011 for the defendant to comply with the order ie to transfer the property to the plaintiff is already over. The 12 months ended on 21 October 2012. Thus, the issue of execution of the consent order under O 45 of the ROC does not arise here at all.

[10] My previous decision in *Tan Bee Ang* is distinguished here. In *Tan Bee Ang*. The application for committal was based on O 45 and O 52 of the Rules

of the High Court 1980 ('RHC'). That was the reason why I held that the penal notice was required to be endorsed in the order in view of the requirements of O 45 r 7(4)(a) of the RHC.

[11] However, in the present case, the plaintiff made the application not under O 45 r 5 of the ROC for enforcement of the consent judgment, but under O 52 of the ROC for committal of the defendant for breach of the consent order.

[12] Order 52 r 2B, 3, 4 and 5 of the ROC provide:

Other cases of contempt (O 52, r 2B)

2B In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

Application to Court (O 52 r 3)

3(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

Application for order after leave to apply granted (O 52 r 4)

4(1) When leave has been granted under rule 3 to apply for an order of committal, the application for the order must be made by notice of application to the Court, and, unless the Court granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing.

(2) Unless within fourteen days after such leave was granted the notice of application is filed, the leave shall lapse.

(3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so.

Saving for power to commit without application for purpose (O 52 r 5)

5 Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order of committal of its own motion against a person guilty of contempt of Court.

[13] As can be seen from O 52 of the ROC, the plaintiff's application is for committal of the defendant for contempt of court for not complying with the consent order. In O 52 there is no mandatory requirement of a penal notice to be endorsed in the order sought to be enforced by the applicant.

[14] All that is required is for the plaintiff to apply by way of an ex parte notice of application under O 52 r 3 of the ROC for leave of the court to commence committal proceedings and such application must be supported by the statement as required in r 3(2).

[15] The plaintiff had duly complied with the requirements of O 52 r 3(1)(2) vide encls 27 (ex parte application for leave) and 28 (statement) respectively. On 5 April 2013 the court had granted the plaintiff leave to commence committal proceedings against the defendant.

[16] The application and cause papers have been served on the defendant. Thus, procedurally, O 52 of the ROC has been complied with by the plaintiff.

[17] What is required in the inter-partes hearing of encl 31 is for the defendant, upon being given the opportunity to be heard, to show cause to the court as to why an order of committal should not be made against him.

[18] The defendant's explanation was that he had on 22 October 2011 made an agreement with a third party ie one Lily Santoso ('Lily') to redeem the property (exh HH1) and this was with the knowledge and consent of the plaintiff since all parties had discussed how to settle the matter amicably at that time. An important term in the agreement is that Lily agreed to pay the redemption sum regarding the sum owed to AmBank by the defendant in respect of the property.

[19] The defendant stated that at all times he was willing to comply with and he had agreed to the consent order based on the agreement with Lily. However, Lily failed to comply with the agreement with the defendant. Had the defendant known that Lily would not comply with the agreement, the defendant would not have entered into the consent judgment with the plaintiff.

[20] I find that the reasons given by the defendant are unacceptable. He had entered into the consent judgment with the plaintiff voluntarily. Nowhere in the consent judgment is it stated that the defendant's obligations thereunder are subject to Lily's compliance with the agreement with the defendant. The consent judgment is binding on the defendant, and not on Lily. The

A obligations of the defendant in the consent judgment have not been complied with until the day of the committal proceedings. This was not disputed by the defendant.

B **[21]** In any case, it is noted from cl 8 of the agreement between the defendant and Lily, which agreement is merely handwritten and not stamped, that the defendant gave the undertaking to Lily not to sell or deal with the property in any way. In cl 5 the defendant agreed that if he failed to pay Lily the sum owed within six months, Lily was entitled to direct the defendant to sell the property C and pay the redemption sum. Thus, there is nothing in the agreement which shows the intention of the defendant to transfer the property to the plaintiff in compliance with the consent order.

[22] It has been shown clearly by the plaintiff that until today the property D has not been transferred to the plaintiff.

[23] The sum of money given in cash by the plaintiff to the defendant is no small sum. It is RM2,376,000, a huge amount of money. The defendant must be held accountable for the plaintiff's loss of his money since the plaintiff has E been deprived of the ownership of the property.

[24] I therefore imposed a fine of RM100,00 on the defendant. Should he fail to pay the fine, he would be committed to seven months' imprisonment.

F **[25]** I am mindful of the provisions of s 432(2) of the Criminal Procedure Code ('CPC') which provide that for a criminal punishment, imprisonment in default of a fine exceeding RM50, the imprisonment shall not exceed four months' imprisonment. However, the present proceedings are in respect of G breach of a civil court order, and not for conviction and punishment for a criminal offence. Thus, this court is not bound by s 432(2) of the CPC. There is no limit to the powers of this court to impose punishment for committal proceedings. I exercised my discretion under the court's inherent powers under O 92 r 4 of the ROC to make the order that is necessary to prevent injustice or H abuse of the process of the court by the defendant.

[26] Furthermore, even if the plaintiff is found lacking in compliance with any procedural technicality under O 52 r 5 of the ROC, the court has the power to make an order of committal on its own motion against a person guilty I of contempt of court. In this case, it is clear that there is a total disregard and failure of, and breach by the defendant of the consent order for about a year after the 12 months allowed in the order.

[27] In my opinion, the fine I imposed is intended to be deterrent in order to

punish the defendant sufficiently for breaching the plaintiff's trust in him and benefiting from the money given by the plaintiff to him. I do not think that the fine is manifestly excessive.

[28] As it turned out, the defendant went to civil prison for one day only on 17 October 2013 and on the next day, 18 October 2013, he paid the full fine and was released from prison. On 21 October 2013 the solicitors for the plaintiff wrote to the court seeking clarification whether the defendant can still be made to comply with the consent order now that the defendant is out of prison. That, however, is not an issue to be dealt with in this encl 31.

[29] Even though the plaintiff had applied for costs in the cause in encl 31, I ordered the defendant to pay costs of RM5,000 which is reasonable in the circumstances of the matter.

[30] Based on the above reasons, I ordered accordingly.

Application allowed.

Reported by Afiq Mohamad Noor